PO - 3572

Ombudsman’s Determination

Applicant	Mr J Sheerin
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent(s)	Cumbria County Council (**CCC**)

Complaint summary

Mr Sheerin has complained that CCC failed to conduct his appeal against the tier of ill health retirement benefits he had been awarded in a proper manner.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against CCC. They did not reach their conclusions properly in Mr Sheerin’s case.

DETAILED DETERMINATION

Material Facts

Relevant regulations

1. The relevant regulations are the Local Government Pension Scheme (Benefits , Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended) (the **Benefit Regulations**) and the Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) (as amended) (the **Administration Regulations**). Regulation 20 of the Benefit Regulations covers ill health retirement and provides for three tiers of benefits depending upon the level of capacity for "gainful employment".

2. Extracts from the Regulations are provided in an appendix to this document.

Material Facts

3. Mr Sheerin was employed by the Lake District National Park (**LDNP**) until 30 June 2011, when his employment was terminated on the grounds of ill health. As required by the LGPS Regulations, the LDNP obtained a certified opinion from an independent registered medical practitioner (**IRMP**). The IRMP, Dr Harker, expressed the view that Mr Sheerin was permanently incapable of discharging efficiently the duties of his employment with the LDNP and, on the balance of probabilities, he had a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age. However, Dr Harker was of the view that Mr Sheerin would be capable of undertaking gainful employment within three years of leaving the LDNP's employment. As a result, the LDNP awarded Mr Sheerin Tier 3 benefits.

4. Mr Sheerin appealed. The LDNP obtained a further certified opinion from a different IRMP, Dr Andrews. She was of the opinion that Mr Sheerin would not be capable of undertaking gainful employment within three years of leaving employment but would be at some time after that and before he reached age 65. The LDNP reviewed Mr Sheerin's case, on 7 August 2012, and decided to award him Tier 2 benefits.

5. Mr Sheerin appealed further in February 2013. Under Regulation 56 of the Administration Regulations, a first instance decision about ill health retirement is made by the relevant employer. Regulations 58 and 59 provide for a disagreement about (amongst other things) a first instance decision to be referred to a specified person. Regulation 60 provides for an applicant to ask the appropriate administering authority to "reconsider the disagreement" if it remains unresolved. In Mr Sheerin's case, the appropriate administering authority is CCC.

6. In connection with his appeal, Mr Sheerin obtained a report from his Consultant Psychiatrist, Dr Basu. Mr Sheerin asked Dr Basu to clarify some of his comments in his previous report relating to the likelihood of him being able to return to paid work. Dr Basu had previously provided reports dated 6 May 2011 and 28 March 2012. Dr Basu had also provided a copy of a report prepared by a Clinical Psychologist, Dr Locatelli-Booth, dated 2 November 2011.

7. In his first report, Dr Basu had outlined the chronology of Mr Sheerin's consultations with him and his treatment so far. He noted that Mr Sheerin had made a partial recovery in 2010 and had returned to work. Dr Basu said that Mr Sheerin had had difficulty coping with some aspects of his work and had discontinued his medication. He explained that Mr Sheerin had experienced a relapse of a mixed mood state which was proving difficult to control and had not responded to two types of medication. Dr Basu said that a third medication had been started but that it might be three months or more before the effects were felt. He noted that Mr Sheerin had had a "fairly significantly abnormal" EEG result in November 2009, although no active neurological abnormality had been detected. Dr Basu suggested that it was possible that Mr Sheerin would respond poorly to medication and have a poorer prognosis because of this. Dr Basu concluded,

> "Bipolar disorder is characterised by multiple relapses … Mr Sheerin has shown most of the risk factors which are associated with a poorer prognosis and chances of repeated relapses over a 5 year period.
>
> Bipolar disorder is also characterised by residual symptoms … These symptoms are however highly troublesome for a functional rehabilitation as the sufferer is unable to organise his work in a predictable fashion, plan effectively for the future and may have problems in interpersonal situations

where a stable mood is required. The residual symptoms also include cognitive deficits such as poor concentration, poor verbal memory and poor visuo-spatial memory; these deficits are perceived to be quite stable and persist even in the absence of mood symptoms. Mr Sheerin has displayed residual symptoms of such severity that it is unlikely that he could be expected to go back to cope with a gainful employment in which he is expected to work consistently for at least 30 hours each week for the next few years.

The medications used to treat bipolar disorder themselves are associated with side-effects which can sometimes interfere with full functional improvement. There are usually symptoms like movement disorders, problems with cognitive abilities and general tiredness and fatigue … Mr Sheerin … has already suffered from significant fatigue and memory problems; it is likely that he will continue to have significant physical and mental side effects which would interfere with his chances of holding on to any gainful employment in the near future.

Mr Sheerin had shown an abnormal EEG in 2009, which increases the chance that he will have a poorer prognosis and will be more difficult to rehabilitate than other sufferers of bipolar disorder …

It is my professional opinion that Mr Sheerin would not be able to hold [down] his job or any other job in a part time or full time basis at this time. I am doubtful of his ability to manage gainful employment in the foreseeable future because of the volatility of his mood, poor concentration and memory functions as well as the severe side effects he is encountering from his medications. I am unable to give a favourable prognosis over the next three years and feel that he would have significant difficulty in going back to any form of work in the near future …"

8. On 2 November 2011, Dr Locatelli-Booth had written to Dr Basu following her assessment of Mr Sheerin's cognitive functioning. She outlined the results of various tests which Mr Sheerin had undergone. Dr Locatelli-Booth said,

"Mr Sheerin completed a range of assessment measures chosen to investigate further his reported difficulties. Below is a summary of the main findings of this assessment …

Mr Sheerin was given a couple of tests on two occasions to assess variability in his cognitive performance over sessions. His performance on these tests was consistent over the two sessions.

A number of tasks he completed indicate deficits in attention which is a difficulty in itself and could also be contributing to lowered performance on other tasks within the assessment and also to his reported day to day difficulties. For example, Mr Sheerin reports day to day difficulties at times in remembering conversations however his scores on verbal memory were average. During assessment his attention was focused on the task in hand and this the information was encoded into his memory. In day to day life however he may be less attentive and distractible and therefore some information may not be encoded and this will not be in his memory to be remembered.

Mr Sheerin's reasoning abilities on verbal tasks are generally in the superior range and are consistent with pre-morbid estimate. On a task of verbal memory which required him to listen to a short story, repeat it immediately and then recall the information after the delay his performance was also in the High Average range which is consistent with pre-morbid estimate.
Mr Sheerin demonstrated a relative weakness on the verbal learning. He displays a patterns of lowered scores on tests of attention and new learning relative to scores on verbal knowledge and skills. Considering these results Mr Sheerin may have more difficulty learning and remembering new information than previously and require more effort to do so.

Mr Sheerin's results indicate some frontal executive functioning difficulties. He demonstrated poor verbal fluency and a lower than expected score on similarities compared with his score on the other verbal reasoning tasks. His ability to shift cognitive set was in the average range and consistent with premorbid estimate.

Mr Sheerin's performance on non verbal reasoning was below expected levels and he demonstrated a particular weakness on the block design task which requires nonverbal fluid reasoning and the ability to mentally organise visual information. Performance on this task may be affected by planning ability.
Mr Sheerin's working memory performance (both verbal and visual) which is the ability to temporarily hold and manipulate information in short term memory was below expected levels. This will potentially make the processing of complex information more time consuming for him, draining his mental energies more quickly as compared to others at this level of ability and perhaps result in more frequent errors on a variety of learning or complex work tasks.

Mr Sheerin's performance on tasks assessing visuo-spatial memory was lower than expected. Visuo-spatial memory can be important in remembering such things as where we put things."

9. In his report of 28 March 2012, Dr Basu outlined the history of Mr Sheerin's illness. He explained (amongst other things) that scans of Mr Sheerin's brain had shown disturbances in function. Dr Basu said that Mr Sheerin's difficulties were not easily explained by a single diagnosis and a combination of an epileptiform phenomenon and Bipolar Affective Disorder had been considered. Dr Basu concluded,

"It is difficult to see how Mr Sheerin could perform adequately in his old job …

I was asked to give my opinion on whether Mr Sheerin's mental state and clinical findings were predictive of short-term or long-term recovery in May 2011 … It is my opinion that Mr Sheerin showed enough prognostic indicators such as changes on EEG, memory loss and poor response to medication by May 2011 that I felt at that time that it would be unlikely that he could be expected to go back to work consistently for the next few years …

I am also requested to answer the question whether Mr Sheerin can go back to any form of paid work in a few years time. Mr Sheerin's performance in the neuropsychological tests revealed significant difficulty with processing information, planning and learning new tasks. It is my professional opinion that it would be extremely difficult for him to do a new job as these cognitive abilities are quite important in being able to understand and learning the needs of a new job.

His level of cognitive decline would also indicate that the deficits have actually grown in the last two years and it is possible that some of Mr Sheerin's cognitive functions are continuing to deteriorate, which would lead to the unhappy conclusion supposition that it is probably unlikely that he would ever be able to go back to paid work.

He also has significant problems with a variable mood, poor motivation, irritability, impulsivity and agitation; these symptoms are causing significant stressors at home and in his immediate circles. It would be difficult for him to work in a paid capacity if these symptoms aren't brought under control. An energetic treatment of his mood symptoms is likely to make his cognitive symptoms worse.

I feel that we have exhausted most major treatment options in the last two and a half years and his current treatment and our treatment goal is at this time to maintain his existing functions and help his family cope with his difficulty."

10. Mr Sheerin provided Dr Basu with copies of Dr Andrews' certificate, a document entitled "Guidance on the LGPS ill health retirement pension provision" and the LDNP's appeal decision. Dr Basu responded,

"You had presented to our services in September 2009 with symptoms relating to disturbances of mood; you were displaying prominent features of low mood and elevation of mood and received a diagnosis of Bipolar Affective Disorder. Your mood symptoms were quite severe and you needed treatment with a combination of mood stabilizing medication …

I had noted that you were also developing memory problems from quite early on in your presentation … The cognitive difficulties appeared to be causing significant difficulties in your personal life and you reported to me to be struggling as a result of these while attempting to go back to work.

I tried to get corroborative information about your reported cognitive difficulties … I also performed various investigations …

I found that all these studies showed some mild form of abnormality … Whilst they didn't point to a diagnosis of dementia they were quite clearly showing some brain changes …

I hope this above description makes it clear that you had been noted to have memory and other cognitive difficulties in addition to suffering from Bipolar Affective Disorder … By the end of 2011, a series of investigations had revealed that there was a physical basis for these problems and these changes were progressive and substantial.

I had hoped that my previous report had made it clear that I did feel at the time of writing the report that you would not be able to return to paid work due to the combined disability of your mood fluctuations and cognitive difficulties. For the sake of clarity, and expressing my conclusions in the language of the regulations as explained in the guidance notes supplied, I confirm that it is my opinion that there is no reasonable prospect of you returning to any gainful employment (or indeed any paid employment) before reaching your normal retirement age."

11. CCC obtained a report from Mr Sheerin's GP, Dr Edmunds, and from a Consultant Occupational Physician, Dr Parker.

12. At the beginning of his report, dated 10 October 2013, Dr Parker set out what he considered to be some of the key points to be considered, as follows:

- It was not a question of diagnosis or the specific clinical features of Mr Sheerin's condition. It was the impact of his condition on his functional capacity that was important.
- As far as he was aware, Mr Sheerin's Psychiatrist and his GP were not trained in occupational or rehabilitation medicine. They did not appear to have considered work-focused rehabilitation in any detail.
- He would expect Mr Sheerin's GP to act as his advocate and to support what he thought Mr Sheerin would choose.
- Gainful employment, as defined, meant any type of job and not just one that Mr Sheerin would normally expect to take up given his education and professional background. Aptitude, skills and training should not be taken into account and nor should motivation or the availability of alternative work; other than to consider whether Mr Sheerin's motivation was affected by his mental health.
- Permanent meant until age 65 and, in Mr Sheerin's case, this meant for the next 13 years. The question was whether functional recovery was, on the balance of probabilities, likely in the next 13 years.
- The decision to award the early payment of benefits and at which tier was for the employer and not the IRMP. The employer could take conflicting medical advice into account.

13. Dr Parker went on to say,

"… I am in no doubt that Mr Sheerin has experienced extremely distressing symptoms …

In addition to the impact of his illness on his mood and behaviour, I have taken particular note of the impact on his cognitive function – the impairments noted

in various tests and described in letters from Dr Basu. This is important in relation to work-related functional capacity.

I have taken note of his family circumstances … (his wife's visual impairment). I have also … taken account of his job and professional responsibilities.

Mr Sheerin's attempted resettlements at work in 2009 and then again in 2010 are well-documented … I note that prior to his health deteriorating in mid-2010, he was able to write a detailed and articulate e-mail to … This is worth mentioning as it indicates that his capacity to compose a detailed argument was preserved at that point, despite the reported cognitive problems.

Mr Sheerin's attempted resettlement in 2011 appears to have been complicated by grievances against his employers and an Employment Tribunal claim. The details are not available to me, but I have to assume that (a) he was able to formulate and manage these grievances and ET claim with the help of his Union despite his illness, and that (b) this conflict may have exacerbated his mental health …

… Mr Sheerin is relying on Dr Basu's view … that "it is probably unlikely that he would ever be able to go back to paid work".

The difficulty with that view – expressed by a psychiatrist – is that it is not backed by any consideration of the potential psychotherapeutic benefits of 'appropriate' work, or of the possibility of work-focused rehabilitation or of changes of either psychotropic medication or psychotherapy over the next 13 years, or of the LGPS Regulations. He has essentially written off Mr Sheerin's potential for work for 13 years without exploring precisely what work might be appropriate and what form of work-focused rehabilitation and training might be feasible in the next 13 years. Dr Basu is not competent to give opinions in relation to the LGPS Regulations, and he goes from a helpful and detailed clinical description of Mr Sheerin's symptoms to the conclusion that he will never work in paid work again."

14. Dr Parker concluded by making the following observations:

- Mr Sheerin retained the ability to construct a detailed and professionally worded letter of appeal. This suggested that his ability of assess complex information and formulate a response had not been completely lost. It may have taken him a long time and he would have focused on the task, but it appeared consistent with some of the test results on verbal reasoning.

- He noted the results of the cognitive tests undertaken by Mr Sheerin and the Psychologist's conclusions that he would have difficulty learning and remembering new information. He had no doubt that Mr Sheerin was permanently unfit to return to his former role with the LDNP or a similar role. He referred to the Psychologist's use of the phrases "maybe affected" and "may have more difficulty" and that she had compared Mr Sheerin to "others at his level of ability" in relation to "complex work tasks". He suggested that this indicated that there had been no "useful measurement" of Mr Sheerin's abilities in a structured vocational assessment for a job which required limited learning.
- There was no evidence that Mr Sheerin had undergone a work-focused assessment with a view to taking up work of limited cognitive challenge. He suggested supermarket work, shop work, production line work or cleaning. He appreciated that Mr Sheerin might consider such work inappropriate given his educational and professional background, but the Regulations required his employer to consider any paid work of 30 hours per week.
- He had taken into account the potential adverse effect such a job might have on Mr Sheerin's mental health. There was a risk that his mental health might be affected by moving to a lower status job. However, vocational rehabilitation specialists and occupational psychologists would be able to help him with this. Patients who suffered significant brain injury, often with psychological change, are managed medically through rehabilitation into jobs within their capacity.
- He had not seen any evidence of an independent assessment of Mr Sheerin's work-capability. For example, an assessment for Employment and Support Allowance. He had not seen evidence that Mr Sheerin had been placed in the "support group" after such an assessment nor that he was deemed to come under Regulation 29/35 of the Employment and Support Allowance Regulations.

15. Dr Parker said that he agreed that Tier 2 benefits would be appropriate.

16. CCC asked Mr Sheerin if he wished to submit any further evidence before they reviewed his case. He asked for sight of Dr Parker's report. CCC said that he would be provided with a copy of the report with their decision. They said they had asked Dr Parker if he thought it necessary to receive any further reports from Dr Basu and that he had said that he had enough cognitive information to consider Mr Sheerin's case.

17. CCC issued their decision on 5 November 2013. They apologised for the delay in dealing with Mr Sheerin's appeal, which they said was due to the early retirement of the officer who initially dealt with it. The key points in CCC's decision are summarised below:

- It was not a regulatory requirement for the IRMP to provide a report detailing how a recommendation had been reached. However, it was included in guidance from the DCLG and it was something that CCC would expect employers to adhere to. The LDNP should have requested a report for their stage one appeal review.
- The form used by the IRMPs complied with the requirements of Regulation 20.
- In addition to the evidence provided by Mr Sheerin, they had obtained information from the LDNP and their occupational health provider, together with new reports from Drs Basu and Edmunds. Dr Parker had also reviewed the case and had agreed with Dr Andrews.
- They agreed that Mr Sheerin was, on the balance of probabilities, permanently incapable of discharging efficiently the duties of his employment. He was therefore eligible for ill health retirement.
- The second point for them to consider was whether Mr Sheerin had a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age. Having considered the evidence, they could "find no reason to reach any other decision but to uphold the award" of Tier 2 benefits.

- The length of time it had taken to review Mr Sheerin's case would have caused him anxiety. They offered a payment of £300 as a gesture of goodwill.

Summary of Mr Sheerin's position

18. Mr Sheerin is of the view that the principal issue with his appeal to CCC lies in their interpretation of Dr Basu's opinion as set out in his two reports and other correspondence. He considers that anyone giving proper consideration to Dr Basu's reports could not fail to conclude that, on the balance of probabilities, he is permanently incapable of undertaking any gainful employment before his normal retirement age.

19. Mr Sheerin says that Dr Parker wrote his report without obtaining a further report from Dr Basu.

20. Mr Sheerin says that he was not asked to provide evidence that he had been assessed for Employment and Support Allowance and, if he had been, he would have been able to show that he has been in the "support group" since leaving his employment with the LDNP.

21. Mr Sheerin refers to Dr Parker's comment that he retained the ability to construct a detailed and professionally worded letter of appeal. He says that he had help from the Pensions Advisory Service, Counsel and members of his family to do so.

22. Mr Sheerin considers that he is eligible for Tier 1 benefits. He would also like to be compensated for the length of time his case has been drawn out.

Summary of CCC's position

23. CCC say that a separate IRMP's opinion was sought because a key factor in Mr Sheerin's appeal was that he was unhappy with the adequacy of the medical evidence used by the LDNP to reach a decision. This was not done because they had any concern about the evidence, but rather to reassure Mr Sheerin.

24. CCC say Dr Parker was asked to review all previous medical evidence and any additional evidence he thought was necessary. He has been an IRMP providing services to LGPS funds for over 10 years and was considered to be more than qualified to consider the case.

25. CCC say that Mr Sheerin was given every opportunity to provide any information he considered appropriate for Dr Parker to review.

26. CCC say that their responsibility in conducting the stage two appeal was, firstly, to assess whether Mr Sheerin was eligible for an ill health pension under Regulation 20(1) and, secondly, to review the level of pension awarded.

27. CCC say that, on the first point, they agreed with all three IRMPs and the LDNP that Mr Sheerin was permanently incapable of discharging efficiently the duties of his employment and, therefore, he was eligible for an award.

28. With regard to the second point, CCC refer to the definition of "gainful employment" in the LGPS Regulations. They say that this means any type of employment and not just the one that Mr Sheerin was formerly engaged in. They also say that aptitude, skills and training for or availability of such work are not considerations. CCC also point out that Mr Sheerin was 13 years away from his normal retirement age at the time of assessment and, therefore, they had to determine, on the balance of probabilities, what the likelihood of functional recovery with treatment was over that period.

29. CCC say that the fact that they requested an opinion from Dr Parker does not mean that they in any way delegated the appeal decision. Rather, they say, they considered all the evidence, including the IRMP's recommendation. They say that, given the Regulations require an opinion is sought from an IRMP, it would be perverse not to give it due consideration.

30. With regard to Dr Parker's comment that he had not seen any evidence that Mr Sheerin's work capability had been independently assessed, for example, by being placed in the support group for Employment and Support Allowance, CCC say this is factually correct. They also say that Mr Sheerin was given several opportunities to provide such evidence. CCC say that this does not demonstrate maladministration nor does it make a difference to the IRMP's opinion.

31. CCC also say that the award of ill health retirement and the level of benefits awarded is subject to evidence addressing that particular question; it is not relevant whether Mr Sheerin is in receipt of a State benefit.

32. CCC conclude that they have not seen any evidence which would support the award of Tier 1 benefits. They do not agree that the report from Dr Basu supports a Tier 1 award. Instead, they agree with Dr Parker and point out that he is a very experienced LGPS IRMP.

33. CCC say that, should the final decision is that they should review Mr Sheerin's case, they will endeavour to find an IRMP within his home area to minimise any travelling.

Conclusions

34. Mr Sheerin has been awarded Tier 2 benefits under Regulation 20 of the Benefit Regulations by the LDNP. He appealed that decision. CCC considered his appeal under Regulations 60 and 61 of the Administration Regulations. Under Regulation 61, CCC are required to provide a statement of their appeal decision, including whether and, if so, the extent to which the Regulation 59 decision (that is, the stage one appeal decision by the LDNP) is "confirmed or replaced" (my emphasis). In my view, this means that CCC may come to an independent decision as to Mr Sheerin's eligibility for benefit under Regulation 20. Otherwise the regulation would not provide for them potentially to replace the LDNP's previous decision.

35. CCC are required, therefore, to do more than simply review the decision reached by the LDNP and it was appropriate for them to seek the opinion of an IRMP who had not previously been involved.

36. Mr Sheerin is of the opinion that he should have been awarded Tier 1 benefits on the grounds that "there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age". CCC upheld the earlier decision by the LDNP to award him Tier 2 benefits. In other words, they found that, whilst Mr Sheerin was permanently unable to discharge the duties of his employment with the LDNP, "it is likely that he will be capable of undertaking any gainful employment before his normal retirement age".

37. Mr Sheerin believes that CCC came to this conclusion because they did not give proper consideration to Dr Basu's reports. Although CCC said, in their stage two decision letter, that they had fully considered all the available evidence, they did not go into any detail as to how they had reached their decision and what evidence they

were relying on in making it. Regulation 61 itself requires CCC to include, in their decision notice, "a reference to any legislation or provisions of the [LGPS] on which [they] relied". It does not refer specifically to the evidence on which they relied. However, Regulation 61 calls for an explanation of whether CCC are confirming or replacing the earlier decision. CCC stated that they could "find no reason to reach any other decision but to uphold the award". I do not find that this is sufficient explanation to fulfil the requirements of Regulation 61. Nor do I find that it was sufficient explanation for Mr Sheerin to be able to understand why and how CCC had reached the decision they had. Mr Sheerin needed to know the reasoning behind CCC's decision and the evidence they had relied on either so that he could accept that decision or so that he was in a position to properly prepare a further appeal.

38. In making a decision, CCC are expected to weigh up all the available evidence, consider the provisions of Regulation 20 and come to a reasoned decision. It is open to them to give greater weight to some of the evidence, for example, the advice from the IRMP, provided that they have given due consideration to all the evidence. CCC say that it would be perverse not to give an IRMP's opinion due consideration, given that the Regulations require such an opinion to be sought. I do not think anyone is suggesting that they should not give due consideration to the IRMP's opinion. However, if CCC are to rely on that opinion, they must be satisfied that there are no cogent reasons why they should not do so; for example, that there are no omissions or errors of fact or misunderstandings in the IRMP's report and that he has been provided with the relevant available evidence. CCC can be expected to actively review the advice they receive from an IRMP.

39. CCC obtained a report from Dr Parker whom they describe as a very experienced LGPS IRMP. They say that they agree with his view and disagree that Dr Basu's reports support a Tier 1 award. In view of the reliance placed on Dr Parker's opinion by CCC, it is worthwhile looking in some detail at his report.

40. Dr Parker commented that, as far as he was aware, Dr Basu and Mr Sheerin's GP were not trained in occupational or rehabilitation medicine. He also said that he would expect the GP to act as Mr Sheerin's advocate. As an IRMP, Dr Parker was

being asked to provide an opinion as to whether Mr Sheerin met the criteria set out in Regulation 20. It was not appropriate for him to open his report by providing reasons for why he thought the evidence from other medical practitioners should be given any less consideration. He acknowledged himself that he did not know whether Dr Basu or the GP had any training in rehabilitation and/or occupational medicine and, therefore, he was not in a position to comment on their knowledge. Any such comments should be ignored by CCC and the practice discouraged.

41. I note that Dr Parker later commented that Dr Basu was "not competent" to give an opinion in relation to the LGPS Regulations. This is going too far. It is true that Dr Basu would not qualify as an IRMP but this is not to say that he is not competent to give an opinion on whether Mr Sheerin meets the criteria set out in Regulation 20. The requirement to seek the opinion of a medical practitioner qualified in occupational medicine should be seen as a minimum rather than a reason to exclude the opinions of medical practitioners qualified in other, equally relevant, fields. Again, CCC should discount such remarks.

42. Dr Parker noted that, in 2010, Mr Sheerin had been able to write a detailed and articulate e-mail. However, he was being asked to give an opinion on Mr Sheerin's capability in 2011. CCC did not ask Dr Parker to explain why he thought this relevant to the situation in 2011; particularly in view of Dr Basu's comments about the deterioration of Mr Sheerin's condition. Dr Parker also noted that Mr Sheerin had been involved in a grievance procedure and an Employment Tribunal claim. He acknowledged that he did not have the details but assumed that Mr Sheerin had been able to formulate and manage the grievances and Tribunal claim with the help of his union despite his illness. If Dr Parker was going to draw any conclusions about Mr Sheerin's capability from his participation in a grievance or Tribunal procedure, he really needed to know how much of a contribution he had made. CCC could have provided this information for Dr Parker and asked him to clarify his thinking.

43. Dr Parker said that Mr Sheerin was relying on Dr Basu's view that it was unlikely he would be able to return to paid work. He went on to say that this view was not backed by a consideration of "the potential psychotherapeutic benefits of

‘appropriate’ work” or the possibility of work-focused rehabilitation. As before, I find that Dr Parker’s criticism of Dr Basu’s view was inappropriate and should not have been taken into account by CCC. It is also of some concern that Dr Parker then went on to comment that Dr Basu had not taken into account “changes of either psychotropic medication or psychotherapy over the next 13 years”. It is not entirely clear what he means by this and I note that CCC did not ask him to clarify his comment. Dr Basu had commented that he felt that they had “exhausted most major treatment options in the last two and a half years and his current treatment and our treatment goal is at this time to maintain his existing functions”. The appropriateness or otherwise of Mr Sheerin’s treatment was a matter for his specialists. Alternatively (and perhaps more worryingly) Dr Parker may have meant that account should have been taken of the potential for new treatment to be developed in the next 13 years. This is not appropriate. Mr Sheerin’s capability can only be assessed in the light of currently available and appropriate treatment options. Either way, CCC needed clarification.

44. Dr Parker also commented that he had not seen any evidence of an independent assessment of Mr Sheerin’s work capability and referred specifically to Employment and Support Allowance. Mr Sheerin says he would have been able to show that he has been in the “support group” since leaving his employment with the LDNP. CCC say that he was given several opportunities to provide such evidence. It is true that Mr Sheerin was asked if there was any evidence he wanted to submit. However, he was not given the opportunity to see Dr Parker’s report before CCC made their decision. He could not have known, therefore, that this was something that Dr Parker and CCC were likely to take into account.

45. Mr Sheerin asked if he could see Dr Parker’s report before CCC made their decision. There is no reason why they could not have facilitated this request. Had they done so, Mr Sheerin could have provided them with some additional relevant information. It is true that the receipt of a State benefit does not mean that Mr Sheerin is entitled to a benefit under Regulation 20 or that it means he should be awarded Tier 1 benefits. However, this was clearly something Dr Parker felt was relevant to his opinion and Mr Sheerin should have been given the opportunity to provide the evidence.

46. I do not find that CCC conducted the stage two appeal in an appropriate manner and the failure to do so amounts to maladministration on their part. I uphold Mr Sheerin's complaint.

47. It is not the role of the Ombudsman to review the medical evidence and come to a decision as to Mr Sheerin's eligibility under Regulation 20. The proper course of action is for me to remit the decision for CCC to reconsider and I have made directions accordingly. The fact that I have done so should not be taken to mean that I am expressing a view as to the level of benefits which should be awarded to Mr Sheerin; I am not. It should be borne in mind that there is still a possibility that, having sought appropriate clarification and reviewed the case, CCC will come to the view that Tier 2 benefits are indeed appropriate. If that decision is based on appropriate medical evidence, that would be an acceptable outcome; albeit a disappointing one for Mr Sheerin.

48. CCC offered Mr Sheerin £300 in recognition that the length of time it took for them to complete the stage two appeal would have caused him unnecessary anxiety. This was an appropriate attempt to provide redress for maladministration they themselves had identified and should be acknowledged. However, I think it would also be appropriate for him to receive some further modest compensation for the fact that CCC's failure to carry out the appeal in a proper manner means that he is now faced with a further period of anxiety and stress. Having said that, I do welcome CCC's commitment to minimising Mr Sheerin's stress during the review.

Directions

49. I direct that, within 14 days of the date of my final determination, CCC will refer Mr Sheerin's case to an IRMP who has not previously been involved, having first obtained additional information from him regarding his Employment and Support Allowance. They should provide the IRMP with a copy of my final determination. CCC will then provide Mr Sheerin with a copy of the IRMP's report as soon as it becomes available. Within a further 21 days of receiving the IRMP's report, CCC will make a fresh decision as to Mr Sheerin's eligibility under Regulation 20.

50. Within 21 days of the date of my final determination, CCC will pay Mr Sheerin £250 in recognition of the additional anxiety caused to him by the need for them to undertake this additional review in addition to the £300 they have already offered him.

Jane Irvine

Deputy Pensions Ombudsman

23 January 2015

Appendix

Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

Regulation 20

"(1) If an employing authority determine …

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased —

(a) as if the date on which he leaves his employment were his normal retirement age; and
(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased —

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or normal retirement age if earlier, his benefits —

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and
(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching

(14) In this regulation –

“gainful employment” means paid employment for not less than 30 hours in each week for a period of not less than 12 months;
“permanently incapable” means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and
““an independent registered medical practitioner (“IRMP”) qualified in occupational health medicine” means a practitioner who is registered with the General Medical Council and —

(a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, “competent authority” has the meaning given by section 55(1) of the Medical Act 1983; or

(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state.”.”

The Local Government Pension Scheme (Administration) Regulations 2008

Regulation 58

“(1) This regulation applies where there is a disagreement about a matter in relation to the Scheme between a member (or an alternative applicant) and an employing authority or the administering authority …

(3) The member … may apply to -

(a) the person specified under regulation 57(5)(c) to give a decision on the disagreement; or

(b) the appropriate administering authority for that authority to refer the disagreement to that person for a decision …”

Regulation 59

“(1) A decision on a disagreement to which an application under regulation 58 relates must be given by notice in writing …

(3) A notice under paragraph (1) must include -

(a) a statement of the decision;

(b) a reference to any legislation or provisions of the Scheme on which the person making the decision relied;

(c) in a case where the disagreement relates to the exercise of a discretion, a reference to the provisions of the Scheme conferring the discretion …

Regulation 60

"(1) This regulation applies where an application about a disagreement has been made under regulation 58 and -

(a) notice of a decision has been given under regulation 59(1) …

(2) The applicant … may … make an application to the appropriate administering authority to reconsider the disagreement …"

Regulation 61

"(1) The appropriate administering authority must give its decision on an application under regulation 60 by notice in writing …

(3) A notice under paragraph (1) must include -

(a) a statement of the decision;

(b) in a case where a decision was given under regulation 59, an explanation of whether and, if so, the extent to which that decision is confirmed or replaced;

(c) a reference to any legislation or provisions of the Scheme on which the authority relied;

(d) in a case where the disagreement relates to the exercise of a discretion, a reference to the provisions of the Scheme conferring the discretion …"